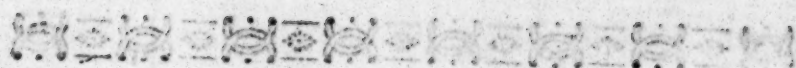




S T A T E
OF THE
C A S E
OF
CAPTAIN JONES.



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S T A T E

OF THE

C A S E

OF

WILLIAM JONES.



THE
S T A T E
OF THE
C A S E
OF
CAPTAIN JONES,

As it was on TUESDAY presented to His
MAJESTY; and in Consequence of which
he was pleased to grant a Respite till Wed-
nesday next,

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THE
STATUTE

OF THE
CLASSES

OF
CAPTAIN JONES

It was on Tuesday presented to His
Majesty; and in consequence of which
he was pleased to grant a Respite till Wed-
nesday next.

Witness: Thomas T. Jones, Esq.
Attorney at Law.



The CASE of Capt. JONES, &c.

May it please your Majesty !

I DO not mean an Attempt to exculpate Capt. JONES ; he may, perhaps, be deserving of his Fate ; but to examine if the Proofs that appeared upon his Trial are of a Nature evident and strong enough to convict him.

If I was to enlarge upon this Subject, I would examine if our Eagerness to justify other Vices, does not impose upon us a false Virtue, under the Appearance of Horror, of the Crime imputed to Capt. JONES.

I would examine, if after the Age in which LOCKE has, by invincible Reasons, destroyed the Chimera of the Schools, upon innate Ideas,
to

to which Moralists were so attached; if, after the Age in which NEWTON, by presenting a Prism to the Sun, has, by a single *geste*, in a Manner laid open the Secrets of Heaven and the Ignorance of Mankind; if, I say, Men can still, as in the Days when the Belief of Antipodes was reckoned an Absurdity, and a Blasphemy, say, that *a Crime is against Nature, beyond Nature*, and that *Nature must be avenged*: These Researches are out of my present Purpose. I mean to confine myself to the Investigation of this *Quære* only; Are the Proofs which convicted Capt. JONES consistent with the Nature of Laws in general, and of those of England in particular?

This Examination is of the utmost Importance to Society, since the Result of it will clearly demonstrate, whether Legislation, in Cases of this Nature, is armed against the Guilty only, or opens to Calumny and Perjury, an ever-devouring, ever-craving Abyfs, into which it may drag the unfortunate Objects that it points out for its Victims.

I must

I must premise to the Reader, that my Reason and Sentiment heartily concur to approve and reverence the Law which condemns to Death, Men guilty of the Crime of which Capt. JONES is accused: But can a feeling and unbiassed Mind approve of the Proceedings in his Trial and Condemnation? And as the Disquisition of this Question falls into the Comparison which the illustrious FORTESCUE makes of the Civil penal Laws, and the Proceedings of the Courts of Justice of England in criminal Cases; what he says on this interesting Subject, in his Treatise *De laudibus Legum Angliæ*, will serve for a Basis to the few Examples and Authorities to which the Narrowness of my Bounds confine me.

The Law, says he, (Chap. iii,) is a holy Sanction, commanding Things that be honest, and forbidding the Contraries. And in Chap. iv. Men's Laws are nothing else but certain Rules whereby Justice is perfectly taught.

I admit this Definition, and am convinced with the Publick of the Importance of the Law which condemns to Death Men guilty of this

this detestable Crime: But if our Astonishment is raised at the Difference we make between Crimes equally proscribed by the Law of God, we cannot but be convinced that we have the greatest human Interest to keep entire, and stick religiously to, the Definition of Right that FORTESCUE gives us.

Right also, says he, (Chap. iii.) by Description is called the Art of that which is good and streight.

Now we are to consider, whether the criminal Proceedings which condemned this unhappy Man, be the Art of rescuing Innocence from the Snares of Villainy, or rather that dreadful one of yielding it up its Prey.

Civil Laws, says he, (Chap. vii.) are accounted odious; and here are his Reasons he assigns for it: Chap. xx. By the Civil Laws must be tried, by the Exposition of Witnesses, wherein two allowable Witnesses are sufficient: But by the Laws of England, the Truth of the Matter cannot appear evident to the Judge; without the Oaths of twelve Men, Neighbours to the Place where such a Deed is supposed to be done.

After

After having quoted dreadful Examples of the Civil Jurisprudence, and represented that of England as that of free and just Men, who would rather that a Thousand guilty should escape, than make Use of Laws by which so many innocent Persons may be a Prey to infamous Calumniators, and virtuous Citizens be put to Death by the Machinations of the Wicked; FORTESCUE, filled with the Enthusiasm of Liberty, and Detestation of Injustice, exclaims with Horror, (Chap. xxi.) *Who then shall be able to live in Surety of his Goods, or of himself, under such a Law, that ministers such Aid to every Busy-body that lusteth to trouble another? And, Chap. xxxii. How horrible and detestable Dangers happen, through the Form of proceeding by Witnesses?*

It is thus he expresses himself on Judgments rendered on the Evidence of two Witnesses, in other respects irreproachable in the Eye of the Law. Agreeable to this, it is a fundamental Maxim, that Jurymen ought not to judge according to their Conscience only, but that their Conscience must remain dumb on this Head, till it is, as it were, compelled to it by

B

Proofs

proofs which *debent esse evidentes, perspicuae, & faciles intelligi*. COKE ON LITTLETON. Fol. 138.

FORTESCUE, who lived at a Time when the Prerogative of the Kings of France was less extensive, than that assumed by our Kings now, speaks thus of the despotic Abuse, that the former made of Civil Laws, admitted in France.

Gentlemen and Nobles are not so oppressed and overcharged with Exactions;---and immediately as soon as the Princes Conscience hath, through the Report of others (Witnesses) judged him guilty, he is without any Fashion put in a Sack, and hurled into a River.

In fine, it is only in the Difference of the penal Laws received in France, and those of England, that he foresaw in France, the fatal Seeds of Despotism, triumphing over all the Efforts of Liberty; and in England the happy Seeds of public Liberty, baffling all the Efforts of Despotism. He could not without Doubt, foresee the Revolutions that would be produced on all the Parts of the Universe, by
the

the Discoveries which were to Approach them in some Measure, and connect them by Commerce; he could still less suspect that the prodigious Influx of Foreigners of all Nations, and particularly of French, could one Day, make of the Capital of England, a City, foreign to the English themselves, and give Room to the COUNT LAURAGUAIS to call it the common Inn of the Terrestrial Globe, betwixt the East and West Indies. Before we return to the Opinion of FORTESCUE, let us see what are the Precautions which the Nation has at all Times taken to preserve that Flame of Liberty, which all the Storms excited to destroy it have not been able to extinguish. Let us examine by what fatal and universal Oversight, Discord, or Despotism, under the Mask of Regard for Morals and publick Liberty, endeavouring to extinguish that Spark which is sufficient to preserve the sacred Fire.

Never was there a more spacious Field to expatiate upon, and such is the Nature of this Case, that contrary to what is common, much

is necessary to be said, but for fear of fatiguing the Reader I shall avoid Prolixity.

We have seen the Definition, that COKE gives on Witnesses, *Debent esse evidentes, perspicue et faciles intelligi.* For which Reason Witnesses are sworn to tell the Truth of what they know, not what they believe: For they are to Swear nothing but what they have heard or seen. Lib. Affiz. 23. Plant. 11. Vaugh. 142. BUSHELL's Case.

From whence proceeds this Maxim, that a Party interested in the Suit, or a Wife for, or against, her Husband (except in Cases of High Treason, or Adultery) may not be a Witness. 4. Inst. 279.

Because it has been resolved by the Justices, That the Wife cannot be produced as a Witness, either against, or for, her Husband, *Quia sunt due anime in una Carne.* 1. Inst. 66.

Hence, in fine, these Statutes that the Scythe of Time has for the good of Humanity hitherto respected.

I^o. Testes non possunt testificari Negative fed Affirmative. 4. Inst. 279.

II^o. Judex non potest esse testis (or testis non potest esse judex) in propria Causa.
4. Inst. 279.

III^o. Testibus deponentibus in pari Numero dignioribus est credendum. (Ibid.)

IV^o. Allegans contraria non est Audiendus, verum non toto vero continens est falsum, nec vero nec falso. (Ibid.)

V^o. Juramentum est indivisibile & non Admittendum in parte, verum & in parte falsum. (Ibid.)

VI^o. Allegans suam turpitudinem non est audiendus. (Ibid.)

VII^o. Jusjurandum inter alios factum nec nocere nec prodesse debet. (Ibid.)

VIII^o. Facultas probationum non est angustanda. (Ibid.)

IX. Plus Valet unus Ocultus testis quam auriti decem. (Ibid.)

X.

X. Vox Simplex, nec probationem facit nec presumptionem. (Ibid.)

XI. Qui prodit in Scenam ad testificandum Mercedis ergo infamis est. (Ibid.)

It is also upon Account of the Importance of the Subject that, *If a Person is infamous he shall not be sworn, either as a Juror, or as a Witness.* Stat. 5. Eliz. C. xiv. And by Statute 1. H. 5. Chapter iii. *Or if the Witness be an Infidel, or not Sane Memoire, or not of Discretion, or a Party, interested, &c. &c.*

And the Motive of any Interest whatsoever, has appeared so formidable, That *the Parson of a Parish, is not to be admitted as a Witness to prove the Bounds of his Parish,* because interested in the Tythes. Forestry 63.

It is likewise known that the Examination of an Infant of 13, nay, of 9 has been allowed in some Cases. H. P. C. 264.

But in what Time was this Law made? And what were its Effects in Times of Innocence, or, if you will, of savage Roughness? And what
they

they be at this Time of Corruption, or, if you will, refined and polished Manners.

There are Things that may be unknown, or disputed, before they are sufficiently evidenced; but which, being made known and established, become immutable; such are the Maxims we have established above. Now who can doubt but a Chain of such Maxims, should have more Weight than a particular Statute made upon an intricate point, and which might even be attacked upon the Basis that Judge BLACKSTONE lays down in the Exposition of his Commentaries, touching the Constitution of Statutes in general, but without pursuing this, Examen, I will confine myself to affirm only, That no Evidence whatever is to be admitted, but when it is presumed that he will discover the Truth that is wanted: Or, that the Perjury be ascertained, without which nothing would remain to Men but Cries of Despair, or Tears of Anguish to shed: FORTESCUE having already exclaimed *Oh! Horrible and detestable Dangers happen through the Form of proceeding by Witnesses.*--It is no less evident that Truth supposes I^d. a Fact from which a

a moral Proof may be deduced ; or, II^d. Moral Proofs, by which a physical Fact may be traced : But it is as true and clear that every Action that cannot be linked by this legal Chain, can have but God only for Judge, as it is indubitable that every Principle concerning Society, Tranquility, and consequently Property and Liberty are entirely destroyed, if it be once admitted that a moral Proof can be constituted without tracing to, or parting from, a Fact.

Now, if FORTESCUE, by Experience had so great a Horror for the Proofs of two Witnesses, How can a reflecting Mind be satisfied with a single Witness? It is certainly more easy to feel, than express, the Horror that presents itself to the Mind on such an Occasion.

Let us compare the Wisdom of the Legislation in the Precautions it has taken relative to the Admission of Jurors, and the Admission of the vague Deposition of a Boy in a Trial upon Life and Death. How can a free People submit to such a Deposition? when the Journals of the House of Commons are rejected as Evidence, because the House of Commons has no
Power

Power to give an Oath: but the Journals of the House of Peers are Evidence, because that is a court of Record. (JEFF. C. I. DALT. Trial 55.)

I might put a thousand fundamental Questions upon the material Distinction between the House of Commons and the upper House: I will only ask, Whether the Authenticity of a Fact established in the Journals of the House of Commons, bears not more forcibly upon the Mind, than any Oath of any Person whatsoever; especially in an Age in which Perjuries are so common, that ever in point of geometrical Dimensions, the Inhabitants of a Parish are not admitted as Evidences with regard to the Extent of what they think belonging to their Parish? If therefore every thing depends on an Oath, Why are we at so great a distance from the Times, in which the Gods themselves could not with impunity swear by the Styx? But in every Age the Essence of an Oath has been, and shall be, that the Evidence be apprised of the nature of an Oath.

And is this the Nation, that from the Top of a Bengal Scaffold inveighs against the Fires
of

of Mexico, still smoaking? How dare we, avaricious Tyrants, reproach the Spaniards with superstitious Tyranny? And the Portuguese with burning Jews alive? We who have burnt Witches on the Ashes of a BACON and a LOCKE. How dare we to brand with the Term of Barbarians, the People who fixed the Periods of the human Life, at which a Witness's Evidence had more or less Force, while we admit a Boy of nine Years old, the Power of destroying any Body? Horrible to think! The Law which allows a Boy to swear away any Life, is not the Law of a free Nation; 'tis the Law of a slavish Nation; nay, 'tis an infernal Law.

It will be replied, That according to my Notions, the most infamous Crime may escape Punishment: Still, I say, that no Crime is to be punished but upon full Proof: And if you reply, That it never will be proved; I say again, That it ought never to be punished: And I dare advance, That the Basis of all Law is destroyed, when any Crime is punished without evident and sufficient Proof. What is it that constitutes a Crime, but the Proofs
that

that it has been perpetrated ? It is the Business of Society to punish Crimes when fully proved, and the Crime that is not fully proved, must be left to the Vengeance of God. But 'tis a false Opinion, That the Crime imputed to Capt. JONES, can never be discovered, if all other Evidence be refused, but ocular. There are no Crimes so common in this Island as Robberies on the Highways, in the Darkness of Night : Yet such Robberies come to Light in a little Time ; and we see those Crimes daily published in the Papers, with every according Circumstance.

The Crime in question cannot be ascertained (on the Supposition of a mutual Consent) but by means of the Proofs that are common in every other Case ; or (in the Supposition of a Violence) by means of the Proofs of such Violence.

It is said, That the Circumstances, in the Case of the Captain, are what operates against him : But I insist, That every moral Circumstance arising from the Deposition of a single Witness, will never have the Force of a Fact ;
and

and that a Fact, averred by a single Witness, ought not to be considered as a Fact by a Jury : And I do still insist, That the Deposition of a Witness is to be weighed according to the Principles set down in the Statutes.

In the present Case, I ask, Whether the Witness is, or is not, to be considered as *Judex in propria Causa*. He is not only a judge, but by a Delirium, unnatural in a free Country, this Witness comes to be the most deliberate, and most despotic Tyrant ; for he becomes a Witness, a Juryman, and a Judge, if we are obliged to stick to his Deposition as true.

Have we had Witnesses in the Captain's Case ? No : Have we any probable Arguments of a Violence committed to the Prejudice of the Boy ? No : Has any Body heard his Cries, or seen his Tears ? No. Had I heard his Cries or seen his Tears I might have asked him why he cried and wept ; and then say : *Plus valet unus oculus testis quam auriti decem, & Vox simplex nec probationem facit nec Presumptionem inducit.*

If

If all this had existed, I could not stand against Suspicions fatal to the Captain: But if nothing of this existed, I cannot help asking, How comes the Captain to be cast? I may be answered, That he is cast on the simple Deposition of the Boy; But let us, for an Instant, suppose the Boy guilty of Consent, or Calumny: In either Case we must adopt the Principle, that *Allegans suam turpitudinem non est audiendus*.

However, I seek for Information, and am told, That the Boy went twice to the Captain; that he suffered the first Insult in silence, and that he charged him only on the Repetition of it, and that, three Weeks thereafter: If I ask, Why he did not charge him the first Time? I shall be answered, That his Bashfulness kept him silent: But why did not Bashfulness keep him silent the second Time?

One of the two; either the Boy went to the Captain, a second Time, of his own Accord, or by the Advice of Somebody. If he went of his own Accord, he must necessarily raise a Suspicion that he consented to the Crime;
and

and in this Case, his Testimony is not to be admitted, until he is considered as having turned Evidence, on the Promise of a Pardon, which is not the present Case. If he went by the Advice of Somebody, I cannot conceive how that Somebody, in consequence of the Advice given, certainly given with the View of obtaining an ocular, or at least an auricular Proof of the Captain's Crime, has not been able to obtain that Proof: From which I insist, That still the Matter rests merely upon the Boy's Evidence; and that it may as well be a Calumny as not; nor is any Man to be condemned to any Punishment, while the Suspicion of a Calumny cannot be entirely removed.

A L A W Y E R.



